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3
4 UNITED STATES DISTRICT COURT
5 EASTERN DISTRICT OF WASHINGTON

6 REBECCA TROSPER,)
7 Plaintiff,) No. CV-09-03048-JPH
8 v.) ORDER GRANTING DEFENDANT'S
9 MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
10 of Social Security,)
11 Defendant.)
12)

13 BEFORE THE COURT are cross-motions for summary judgment noted
14 for hearing without oral argument on April 16, 2010 (Ct. Recs.
15 15,18). Attorney D. James Tree represents plaintiff; Special
16 Assistant United States Attorney L. Jamala Edwards represents the
17 Commissioner of Social Security ("Commissioner"). The parties have
18 consented to proceed before a magistrate judge (Ct. Rec. 8). On
19 March 9, 2010, plaintiff filed a reply (Ct. Rec. 20). After
20 reviewing the administrative record and the briefs filed by the
21 parties, the court **GRANTS** Defendant's Motion for Summary Judgment
22 (Ct. Rec. 18) and **DENIES** Plaintiff's Motion for Summary Judgment
23 (Ct. Rec. 15).

24 **JURISDICTION**

25 Plaintiff protectively applied for supplemental security
26 income (SSI) on October 13, 2004, alleging onset due to
27 degenerative disc disease (DDD) and fibromyalgia as of January 1,
28

1 1993 (Tr. 60). The application was denied initially and on
2 reconsideration (Tr. 47-48, 51-54).

3 A hearing was held June 12, 2007, before Administrative Law
4 Judge (ALJ) Linda Haack. Plaintiff, represented by counsel, and
5 vocational expert Gail Young testified (Tr. 621-648). On April 16,
6 2008, the ALJ issued her decision finding at step five plaintiff
7 could perform other work existing in the national economy (Tr. 15-
8 26). Accordingly, the ALJ found plaintiff not disabled as defined
9 by the Act (Tr. 26). On March 25, 2009, the Appeals Council denied
10 review (Tr. 5-8). Therefore, the ALJ's decision became the final
11 decision of the Commissioner, which is appealable to the district
12 court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action
13 for judicial review pursuant to 42 U.S.C. § 405(g) on May 15, 2009
14 (Ct. Recs. 2,4).

15 **STATEMENT OF FACTS**

16 The facts have been presented in the administrative hearing
17 transcript, the ALJ's decision, the briefs of both parties, and
18 are summarized here.

19 Plaintiff was 20 years old when she protectively filed her
20 application, and 23 the date of the ALJ's decision. She earned an
21 adult high school diploma in 2003 with GPA of 3.4 (Tr. 26-
22 27,66,225,624). Although Ms. Trosper has no reported earnings for
23 the past 15 years, she admits she has worked at times as an in-
24 home child care provider (Tr. 25, 61). Plaintiff alleges
25 disability due to DDD, fibromyalgia, migraine headaches,
26 depression, anxiety, a pain disorder, and post-traumatic stress
27 disorder (PTSD).

SEQUENTIAL EVALUATION PROCESS

The Social Security Act (the "Act") defines "disability" as the "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a Plaintiff shall be determined to be under a disability only if any impairments are of such severity that a plaintiff is not only unable to do previous work but cannot, considering plaintiff's age, education and work experiences, engage in any other substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001).

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person is engaged in substantial gainful activities. If so, benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not, the decision maker proceeds to step two, which determines whether plaintiff has a medically severe impairment or combination of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

If plaintiff does not have a severe impairment or combination of impairments, the disability claim is denied. If the impairment is severe, the evaluation proceeds to the third step, which compares plaintiff's impairment with a number of listed

1 impairments acknowledged by the Commissioner to be so severe as to
2 preclude substantial gainful activity. 20 C.F.R. §§
3 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P
4 App. 1. If the impairment meets or equals one of the listed
5 impairments, plaintiff is conclusively presumed to be disabled. If
6 the impairment is not one conclusively presumed to be disabling,
7 the evaluation proceeds to the fourth step, which determines
8 whether the impairment prevents plaintiff from performing work
9 which was performed in the past. If a plaintiff is able to perform
10 previous work, that Plaintiff is deemed not disabled. 20 C.F.R. §§
11 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At this step, plaintiff's
12 residual functional capacity ("RFC") assessment is considered. If
13 plaintiff cannot perform this work, the fifth and final step in
14 the process determines whether plaintiff is able to perform other
15 work in the national economy in view of plaintiff's residual
16 functional capacity, age, education and past work experience. 20
17 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Bowen v. Yuckert*,
18 482 U.S. 137 (1987).

19 The initial burden of proof rests upon plaintiff to establish
20 a *prima facie* case of entitlement to disability benefits.
21 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9th Cir. 1971); *Meanel v.*
22 *Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). The initial burden is
23 met once plaintiff establishes that a physical or mental
24 impairment prevents the performance of previous work. The burden
25 then shifts, at step five, to the Commissioner to show that (1)
26 plaintiff can perform other substantial gainful activity and (2) a
27 "significant number of jobs exist in the national economy" which
28 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9th

1 Cir. 1984).

2 Plaintiff has the burden of showing that drug and alcohol
3 addiction (DAA) is not a contributing factor material to
4 disability. *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001).
5 The Social Security Act bars payment of benefits when drug
6 addiction and/or alcoholism is a contributing factor material to a
7 disability claim. 42 U.S.C. §§ 423 (d)(2)(C) and 1382(a)(3)(J);
8 *Bustamante v. Massanari*, 262 F.3d 949 (9th Cir. 2001); *Sousa v.*
9 *Callahan*, 143 F.3d 1240, 1245 (9th Cir. 1998). If there is
10 evidence of DAA and the individual succeeds in proving disability,
11 the Commissioner must determine whether DAA is material to the
12 determination of disability. 20 C.F.R. §§ 404.1535 and 416.935. If
13 an ALJ finds that the claimant is not disabled, then the claimant
14 is not entitled to benefits and there is no need to proceed with
15 the analysis to determine whether substance abuse is a
16 contributing factor material to disability. However, if the ALJ
17 finds that the claimant is disabled, then the ALJ must proceed to
18 determine if the claimant would be disabled if he or she stopped
19 using alcohol or drugs.

20 STANDARD OF REVIEW

21 Congress has provided a limited scope of judicial review of a
22 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold
23 the Commissioner's decision, made through an ALJ, when the
24 determination is not based on legal error and is supported by
25 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9th
26 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
27 "The [Commissioner's] determination that a plaintiff is not
28 disabled will be upheld if the findings of fact are supported by

1 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9th
2 Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is
3 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,
4 1119 n. 10 (9th Cir. 1975), but less than a preponderance.
5 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9th Cir. 1989);
6 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d
7 573, 576 (9th Cir. 1988). Substantial evidence "means such
8 evidence as a reasonable mind might accept as adequate to support
9 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)
10 (citations omitted). "[S]uch inferences and conclusions as the
11 [Commissioner] may reasonably draw from the evidence" will also be
12 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9th Cir. 1965). On
13 review, the Court considers the record as a whole, not just the
14 evidence supporting the decision of the Commissioner. *Weetman v.*
15 *Sullivan*, 877 F.2d 20, 22 (9th Cir. 1989)(quoting *Kornock v.*
16 *Harris*, 648 F.2d 525, 526 (9th Cir. 1980)).

17 It is the role of the trier of fact, not this Court, to
18 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If
19 evidence supports more than one rational interpretation, the Court
20 may not substitute its judgment for that of the Commissioner.
21 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579
22 (9th Cir. 1984). Nevertheless, a decision supported by substantial
23 evidence will still be set aside if the proper legal standards
24 were not applied in weighing the evidence and making the decision.
25 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,
26 433 (9th Cir. 1987). Thus, if there is substantial evidence to
27 support the administrative findings, or if there is conflicting
28 evidence that will support a finding of either disability or

1 nondisability, the finding of the Commissioner is conclusive.
2 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

3 **ALJ'S FINDINGS**

4 At the hearing plaintiff amended onset to the protective
5 filing date of October 13, 2004 (Tr. 631). The ALJ used the
6 amended onset date (Tr. 15-17). At step one, the ALJ found
7 plaintiff has not engaged in substantial gainful activity since
8 she applied for benefits. Although plaintiff admitted working as
9 what the DOT calls a "child in-home monitor/nanny," she has no
10 reported earnings (Tr. 17). At steps two and three, the ALJ found
11 plaintiff suffers from DDD and depression, impairments that are
12 severe but which do not alone or combination meet or medically
13 equal a Listed impairment (Tr. 18, 22). The ALJ found plaintiff
14 less than completely credible (Tr. 24). At step four, she found
15 plaintiff has no past relevant work because she has no reported
16 earnings (Tr. 25). Relying on the VE, the ALJ found at step five
17 plaintiff's RFC for a range of light work enables her to perform
18 other jobs, such as messenger, fast food worker, and sales
19 attendant (Tr. 26). Because the ALJ found plaintiff could perform
20 other work, she found Ms. Trosper is not disabled as defined by
21 the Social Security Act (Tr. 26). The ALJ found DAA has been in
22 sustained remission at least since onset on October 13, 2004 (Tr.
23 17). Accordingly, DAA was not at issue in this case, both because
24 DAA was not a severe impairment during the relevant period, and
25 because the ALJ found plaintiff not disabled.

26 **ISSUES**

27 Plaintiff contends the Commissioner erred as a matter of law
28 by failing to properly weigh the treating, examining and reviewing

1 professionals' opinions, and this error caused the ALJ to
2 improperly assess plaintiff's RFC (Ct. Rec. 16 at 11). The
3 Commissioner asks the Court to affirm the decision asserting it is
4 supported by the evidence and free of harmful error (Ct. Rec. 19
5 at 15).

6 DISCUSSION

7 A. Weighing medical evidence

8 In social security proceedings, the claimant must prove the
9 existence of a physical or mental impairment by providing medical
10 evidence consisting of signs, symptoms, and laboratory findings;
11 the claimant's own statement of symptoms alone will not suffice.
12 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated
13 on the basis of a medically determinable impairment which can be
14 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once
15 medical evidence of an underlying impairment has been shown,
16 medical findings are not required to support the alleged severity
17 of symptoms. *Bunnell v. Sullivan*, 947, F.2d 341, 345 (9th Cr.
18 1991).

19 A treating physician's opinion is given special weight
20 because of familiarity with the claimant and the claimant's
21 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9th Cir.
22 1989). However, the treating physician's opinion is not
23 "necessarily conclusive as to either a physical condition or the
24 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,
25 751 (9th Cir. 1989)(citations omitted). More weight is given to a
26 treating physician than an examining physician. *Lester v. Cater*,
27 81 F.3d 821, 830 (9th Cir. 1995). Correspondingly, more weight is
28 given to the opinions of treating and examining physicians than to

1 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592
2 (9th Cir. 2004). If the treating or examining physician's opinions
3 are not contradicted, they can be rejected only with clear and
4 convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the
5 ALJ may reject an opinion if he states specific, legitimate
6 reasons that are supported by substantial evidence. See *Flaten v.*
7 *Secretary of Health and Human Serv.*, 44 F.3d 1435, 1463 (9th Cir.
8 1995).

9 In addition to the testimony of a nonexamining medical
10 advisor, the ALJ must have other evidence to support a decision to
11 reject the opinion of a treating physician, such as laboratory
12 test results, contrary reports from examining physicians, and
13 testimony from the claimant that was inconsistent with the
14 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d
15 747,751-52 (9th Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43
16 (9th Cir. 1995).

17 **B. Step two findings - physical impairment**

18 Plaintiff alleges the ALJ erred at step two when she failed
19 to find Ms. Trosper suffers from the severe impairments of
20 migraine headaches and fibromyalgia(Ct. Rec. 16 at 11-17).

21 *Migraine headaches*

22 The record shows (1) on May 2, 2006 (about a year and a half
23 after onset), plaintiff reports migraine and regular headaches; is
24 under a lot of stress due to caring for her two children plus
25 helping her mother with nieces and nephews. A drug, inderal, is
26 prescribed to prevent migraine; she will follow up in two weeks
27 (Tr. 370). (2) At follow up, plaintiff does not mention migraine
28 headaches (Tr. 371). (3) In early November of 2006, plaintiff

1 learned she was pregnant and stopped all medication except celexa
2 for depression (Tr. 395). During the six month period plaintiff
3 took indera, she does not mention migraine headaches (Tr. 371-
4 395). (4) On 2/8/07, plaintiff complained of migraine along with
5 fever, cough, and congestion (Tr. 403). About three weeks later
6 (on 2/28/07) plaintiff, 18 weeks pregnant, sought care in the ER
7 for migraine (Tr. 279, 281). (5) In March of 2007, plaintiff lists
8 "migraines" as a new problem, more than two years after onset. Her
9 expected delivery date was July 8, 2007 (Tr. 112).

10 The Commissioner correctly points out "no treating source
11 [has] indicated functional limitations stemming from headaches
12 that would affect plaintiff's ability to perform basic work
13 activities" (Ct. Rec. 19 at 8; Tr. 20).

14 The ALJ considered plaintiff's credibility when she weighed
15 severity at step two, outlined more fully below.

16 The record fully supports the ALJ's determination migraine
17 headaches are not a severe impairment as defined by the SSA,
18 because no treating source has so opined. In addition, the
19 condition appears effectively controlled with medication. *Warre v.*
20 *Comm'r of Soc. Sec. Amin.*, 439 F.3d 1001,1006 (9th Cir.
21 2006)(impairments effectively controlled with medication are not
22 disabling for purposes of determining eligibility for benefits).

23 *Fibromyalgia*

24 Plaintiff contends the ALJ should have found she suffers from
25 the severe impairment of fibromyalgia. The Commissioner argues
26 Daniel Sager, M.D., indicated only "features of the fibromyalgia
27 syndrome are present" and his impression was of "fibromyalgia
28 syndrome" but he failed to indicate he diagnosed fibromyalgia or,

1 more importantly, "indicate he had established this diagnosis
2 through trigger point evaluation." (Ct. Rec. 19 at 6-7, observing
3 at fn 1 that one of the diagnostic criteria is 11 or more of 18
4 positive trigger points), citing *Rollins v. Massanari*, 261 F.3d
5 853, 856-857 (9th Cir. 2001) and a website containing the American
6 College of Rheumatology diagnostic criterion.

7 A treating PAC, Steve Koontz, referred plaintiff to Dr.
8 Sager, a rheumatologist (Tr. 122). On January 23, 2004 (about ten
9 months before onset), Dr. Sager points out he had no MRI to
10 review. He found no rheumatologic findings. He opined there is "no
11 current strong evidence for a systemic inflammatory or rheumatic
12 disease," although "features of the fibromyalgia syndrome are
13 present, with a focus of chronic pain in the low back region" (Tr.
14 122-123). On February 12, 2004, Mr. Koontz observes Dr. Sager
15 recommended essentially supportive care for plaintiff's chronic
16 back pain (Tr. 143, referring to Tr. 123). The ALJ indicates on
17 February 20, 2004, Dr. Sager lists plaintiff's problems as
18 fibromyalgia syndrome and chronic low back pain, with
19 "unremarkable further diagnostic study, radiographs and lab," as
20 well as "general report of improvement in symptoms with stress
21 reduction, since last seen." Dr. Sager recommended an
22 antidepressant for chronic pain management (Tr. 19, referring to
23 Exhibit 19F/2 at Tr. 524).

24 Treating doctor Charles Miller, M.D., noted on February 12,
25 2004, "Dr. Sager advised her that she may have fibromyalgia,
26 although she did not meet all the criteria for this" (Tr. 505).
27 All of these records predate onset on October 13, 2004.

28 Physical therapy records dated just after onset indicate

1 "fibromyalgia onset 2004, status discharged from care" (Tr. 148).
2 Plaintiff fails to establish the alleged impairment met the
3 durational requirement.

4 Perhaps the most significant factor relied on by the ALJ is
5 plaintiff's work as a child care provider at times throughout the
6 record during the relevant period of October 13, 2004, through
7 April 16, 2008, in addition to caring for her own young children
8 as a single parent (Tr. 17), citing Exhibit 13E: on June 15, 2007,
9 plaintiff stated her children were aged 2 and 4, and her third
10 child was due next month (Tr. 118-119); in January of 2004,
11 plaintiff told Dr. Sager "she cares for other children for work"
12 (Tr. 122).

13 The ALJ notes plaintiff apparently worked caring for other
14 children through May 2, 2006 (Tr. 18), referring to Exhibit
15 14F/65: on May 2, 2006, C. Denise Heard, FNP, notes plaintiff
16 reports "[l]ots of stress with caring for her two daughters and
17 helping her mother with her nieces and nephews. Hoping to move
18 into her own home in a few weeks" (Tr. 370).

19 An ALJ may properly reject medical opinions proffering
20 limitations inconsistent with the level of activity a plaintiff
21 engages in by maintaining a household and raising two young
22 children, with no significant assistance from a spouse. See
23 *Rollins v. Massanari*, 261 F.3d 853,856 (9th Cir. 2001). In this
24 case, the ALJ additionally relied on evidence plaintiff cared for
25 more children than her own, indicating an even higher degree of
26 physical functioning. While at times plaintiff has stated she had
27 help from her extended family, the ALJ found she was not credible
28 (see below).

1 *Credibility*

2 To aid in weighing the conflicting medical evidence, the ALJ
3 evaluated plaintiff's credibility. Credibility determinations bear
4 on evaluations of medical evidence when an ALJ is presented with
5 conflicting medical opinions or inconsistency between a claimant's
6 subjective complaints and diagnosed condition. *See Webb v.*
7 *Barnhart*, 433 F.3d 683,688 (9th Cir. 2005).

8 It is the province of the ALJ to make credibility
9 determinations. *Andrews v. Shalala*, 53 F.3d 1035,1039 (9th Cir.
10 1995). However, the ALJ's findings must be supported by specific
11 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir.
12 1990). Once the claimant produces medical evidence of an
13 underlying medical impairment, the ALJ may not discredit testimony
14 as to the severity of an impairment because it is unsupported by
15 medical evidence. *Reddick v. Chater*, 157 F.3d 715,722 (9th Cir.
16 1998). Absent affirmative evidence of malingering, the ALJ's
17 reasons for rejecting the claimant's testimony must be "clear and
18 convincing." *Lester v. Chater*, 81 F.3d 821,834 (9th Cir. 1995).
19 "General findings are insufficient: rather the ALJ must identify
20 what testimony not credible and what evidence undermines the
21 claimant's complaints." *Lester*, 81 F.3d at 834; *Dodrill v.*
22 *Shalala*, 12 F. 3d 915,918 (9th Cir. 1993).

23 ALJ Haack gave clear and convincing reasons for her
24 credibility assessment, including inconsistencies between
25 testimony and statements to providers (Tr. 23). The ALJ notes
26 plaintiff testified she averages two migraine headaches a week,
27 but "that claimed frequency of headaches is clearly not consistent
28 with or supported by the medical evidence of record" (Tr. 23,

1 referring to testimony at Tr. 629). An ALJ may properly consider
2 inconsistencies in a claimant's statements when assessing
3 credibility. *Thomas v. Barnhart*, 278 F.2d 947, 958-959 (9th Cir.
4 2002).

5 When asked about physical pain, the ALJ notes plaintiff
6 alleged pain in her right hip and right leg, in addition to
7 chronic back pain; however, as the ALJ correctly observes, the
8 "record reflects no findings, signs or etiology to corroborate any
9 radiculopathy or pain in the right hip/leg" (Tr. 23, referring to
10 testimony at 627). The ALJ relies on the July 12, 2005,
11 examination by neurologist Huong Le, M.D., who noted plaintiff
12 does not describe true radicular pain and denied significant
13 weakness or numbness. Sensation in all extremities was intact.
14 After reviewing the MRI, Dr. Le opined there is no significant
15 nerve compression (Tr. 19-20, citing Exhibit 11F at Tr. 255, 258).
16 The ALJ notes follow up spinal x-rays on March 1, 2006, revealed
17 "no significant narrowing (i.e., stenosis) of the spinal canal"
18 (Tr. 20, citing Exhibit 10F/1-2).

19 A lack of supporting objective medical evidence is a factor
20 which may be considered in evaluating an individual's credibility,
21 provided that it is not the sole factor. *Bunnell v. Sullivan*, 347
22 F.2d 341, 345 (9th Cir. 1991).

23 The ALJ found plaintiff's daily activities are inconsistent
24 with the degree of disability alleged. Ms. Trosper testified she
25 can sit, stand and walk for no more than ten minutes each (Tr.
26 625). As the ALJ points out, this is inconsistent with plaintiff's
27 acknowledgment she sweeps, mops, vacuums, dusts, makes beds, does
28 laundry, and picks up after her children, ages two and four (Tr.

23, referring to testimony at Tr. 623-624, 634). In addition, plaintiff feeds, dresses, bathes, and changes the diapers of her disabled two year old, and drives 60 miles a week, to medical appointments and her parents' home (Tr. 623,635-636).

An ALJ may properly consider the claimant's activities of daily living when weighing credibility. *Thomas*, 278 F.2d at 958-959. The ALJ's reason is clear, convincing and supported by substantial evidence.

The ALJ's reasons for finding plaintiff less than fully credible are clear, convincing, and fully supported by the record. *See Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9th Cir. 2002)(proper factors include inconsistencies in plaintiff's statements, inconsistencies between statements and conduct, and extent of daily activities).

The ALJ's reasons for finding at step two plaintiff does not suffer from the severe impairments of migraine headaches and fibromyalgia are specific, legitimate, and fully supported by the record.

C. RFC - assessed physical limitations

Plaintiff alleges the ALJ's reasons for rejecting limitations assessed by treatment provider Nurse Heard and her supervising physician, Cindy Horton, M.D., are "faulty." They opined from 2001 to the present, plaintiff needed to lie down for 20 minutes, 3-4 times a day (Ct. Rec. 16 at 18-21, referring to Tr. 408-409).

The ALJ notes the referenced opinion was originally signed on March 27, 2007, solely by Nurse Heard, a non-acceptable medical

1 source (Tr. 24). A duplicate was later submitted with Dr. Horton's
2 signature (Id., citing Exhibit 15F). The ALJ notes

3 there are no treatment records from a 'Dr. Horton'
4 anywhere in the file for the period alleged of '2001
5 to the present.' In fact, records from Nurse Heard
6 do not appear in the record until 2005.

7 (Tr. 24).

8 Plaintiff asserts the ALJ erred factually, and cites chart
9 notes with Dr. Horton's initials (Ct. Rec. 16 at 19, referring to
10 Tr. 144,413-416,422) indicating she reviewed the work of nurses
11 and assistants. She also cites Dr. Horton's chart notes (Tr. 135,
12 293, 361, 415, 423 and 444), dating back to at least June 4, 2001,
13 when she saw plaintiff for low back pain (Id). The Commissioner
14 essentially argues the ALJ's error if any is harmless because
15 these records are either outside the relevant period or pertain to
16 routine complaints, and therefore have no relevance to the ALJ's
17 disability determination (Ct. Rec. 19 at 11-12).

18 The Commissioner is correct. More than three years before
19 onset (June 4, 2001) Dr. Horton treated plaintiff for a urinary
20 tract infection (UTI) (Tr. 422). Pre-onset in 2003, plaintiff felt
21 "great" as a result of taking paxil for post-partum depression
22 (Tr. 144). About a month before onset, Victoria Hopkins, PA,
23 discussed with Dr. Horton probable round ligament pain related to
24 pregnancy (Tr. 135). PA Eric Stroud notes in March of 2006 Dr.
25 Horton "worked the patient up for her lower right quadrant pain,"
26 later diagnosed as appendicitis (Tr. 293). Dr. Horton saw
27 plaintiff 8/8/2005 because her young daughter "stepped on"
28 [plaintiff's] breast (Tr. 361).

 The other records plaintiff cites all relate to Dr. Horton's
treatment or oversight pre-onset. (1) Plaintiff, age 16, is doing
ORDER GRANTING DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

1 much better on paxil (4/9/2001); symptoms including back pain are
2 consistent with UTI (6/4/2001)(**Tr. 423**). (2) Plaintiff complains
3 of fatigue, headaches, low back pain, and irregular periods
4 (6/11/01); abdominal pain improved, back pain worse, referred to
5 PT and prescribed anti-inflammatories (6/15/2001)(**Tr. 422**). (3)
6 Plaintiff has postpartum depression, and increased back pain due
7 to nursing and lifting (**Tr. 415**), bronchitis, acne and needs birth
8 control (2/26/2003 -9/12/2003)(**Tr. 415-416**)(4) Plaintiff has a
9 viral upper respiratory infection; her post-partum depression is
10 "a lot better" with medication change; skin lesions (9/15/2003-
11 10/3/2003)(**Tr. 414**). (5) Plaintiff complains of back pain; MRI
12 results for DDD "fairly good"; needs depression medication refill;
13 has bronchitis (11/17/2003 -12/1/2003)(**Tr. 413**).

14
15 More importantly, plaintiff admits the ALJ rejected Nurse
16 Heard and Dr. Horton's contradicted opinion for other reasons,
17 including a lack of support in the medical record for the fill-in-
18 the-blank RFC (Ct. Rec. 16 at 20). Citing *Meanel v. Apfel*, 172
19 F.3d 1111,1113-1114 (9th Cir. 1999) and *Young v. Heckler*, 803 F.2d
20 963,968 (9th Cir. 1986), the Commissioner correctly observes an
21 opinion that is conclusory and inconsistent with the rest of the
22 evidence is properly rejected (Ct. Rec. 19 at 11). The
23 Commissioner also correctly observes the assessed limitations are
24 not supported by any other treating or examining professional
25 during the relevant period.

26 Another specific and legitimate reason the ALJ rejected this
27 opinion is its inconsistency with plaintiff's testimony as to her
28 limitations (Tr. 24). The ALJ's reason is supported by substantial

1 evidence. Plaintiff's testimony included no need to lie down, as
2 the ALJ points out, and "she reports considerably more functioning
3 on a daily basis" than assessed (Tr. 24). Plaintiff's testimony
4 inconsistent with a treating physician's opinion is by itself a
5 specific, legitimate reason, in this instance supported by
6 substantial evidence, to reject a treating physician's opinion.
7 *Magallanes v. Bowen*, 881 F.2d 747, 751-752 (9th Cir. 1989);
8 *Andrews v. Shalala*, 53 F.3d 1042-1043 (9th Cir. 1995).

9 When, as in this case, a claimant's credibility has been
10 permissibly discounted, the ALJ may also disregard an opinion
11 based on subjective complaints. *Tonapetyan v. Halter*, 242 F.3d
12 1144,1149 (9th Cir. 2001).

13
14 **D. Step two findings - mental impairment**

15 Plaintiff alleges the ALJ erred when she failed to find
16 anxiety, pain disorder, and PTSD severe impairments at step two
17 (Ct. Rec. 16 at 11, 16-17).

18 On April 29, 2005, about six months after onset, Dr. McCollum
19 examined plaintiff (Tr. 221-227). Ms. Trosper stated she took care
20 of children for her mother from November of 2002 through June of
21 2003 (Tr. 225). As the ALJ observes, this statement is
22 inconsistent with reports to medical providers she also did this
23 work from January of 2004 through May 6, 2006 (Tr. 21, citing
24 Exhibits 4F/1-3, 12F/63, and 14F/654p; Tr. 225).

25 Dr. McCollum diagnosed depressive disorder, moderate, DAA in
26 partial to sustained remission, PTSD, and a pain disorder
27 associated with both psychological factors and a general medical
28 condition. He assessed a GAF of 60 (Tr. 227). The parties are

1 correct the ALJ erred when she mistakenly indicates Dr. McCollum
2 failed to diagnose PTSD (Tr. 23). Dr. McCollum notes Ms. Trosper
3 admitted using methamphetamine for five months until she got
4 pregnant, as the ALJ observes (Tr. 21, 224). Plaintiff was
5 pregnant at the time of the evaluation. Her daughter Ariana was
6 two years old (Tr. 221, 224).

7 When she rejected some of Dr. McCollum's contradicted
8 assessed limitations, the ALJ points out:

9 "Of particular note in regard to the diagnosis of pain
10 disorder, Dr. McCollum opined: 'She likely realizes secondary gain
11 from this hypochondrial orientation.'" (Tr. 21, referring to Tr.
12 226). Motivation of secondary gain and the ALJ's negative
13 credibility assessment are specific, legitimate reasons for
14 discrediting some of Dr. McCollum's assessed limitations. See
15 *Tonapetyan*, 242 F.3d at 1149.

16 Dr. McCollum relied on plaintiff's reported diagnosis of
17 fibromyalgia when he diagnosed a pain disorder. As noted, the ALJ
18 found the medical evidence does not support plaintiff's assertion
19 (Tr. 21).

20 The ALJ rejected some of Dr. McCollum's limitations based on
21 plaintiff's lack of history of mental health care (Tr. 21).

22 Unexplained or inadequately explained reasons for failing to
23 seek medical treatment cast doubt on a claimant's subjective
24 complaints. *Fair v. Bowen*, 885 F.2d 597,603 (9th Cir. 1989).

25 The ALJ appropriately rejected some of Dr. McCollum's
26 assessed limitations because they are contradicted by medical
27 evidence. She also rejected his opinions to the extent they
28 appear to be based in part on plaintiff's unreliable self-report.

1 Both are specific legitimate reasons supported by substantial
2 evidence. *See Bayliss v. Barnhart*, 427 F.3d 1211,1216 (9th Cir.
3 2005)(an ALJ is not required to credit opinions based on
4 plaintiff's unreliable self-reporting).

5 The ALJ's RFC limited plaintiff to simple, routine,
6 repetitive work (Tr. 25). The mental limitations assessed by the
7 ALJ are supported by the record. Plaintiff's ability to work
8 caring for children at times during the relevant period is simply
9 one factor that undermines allegedly disabling mental limitations.

10
11 Plaintiff fails to meet her burden of proving that her
12 alleged mental impairments "significantly limit" her mental
13 ability to do basic work activities. *See* 20 C.F.R. §
14 404.1520(c)(2007); *see also Burch v. Barnhart*, 400 F.3d 676, 682-
15 683 (9th Cir. 2005). The ALJ's error with respect to the PTSD
16 diagnosis is unlikely to change the result, given the record in
17 this case. An error is harmless when the correction of that error
18 would not alter the result. *See Johnson v. Shalala*, 60 F.3d 1428,
19 1436 n9 (9th Cir. 1995). An ALJ's decision will not be reversed
20 for errors that are harmless. *Burch*, 400 F.3d at 679.

21 The ALJ appropriately relied on plaintiff's credibility when
22 she assessed the contradictory opinions of mental limitations. The
23 ALJ's other reasons, including diagnoses based on plaintiff's
24 unreliable self-report, the lack of mental health treatment, and
25 plaintiff's ability to perform some work during the relevant
26 period are specific, legitimate and fully supported by the record.

27
28 The ALJ is responsible for reviewing the evidence and

1 resolving conflicts or ambiguities in testimony. *Magallanes v.*
2 *Bowen*, 881 F.2d 747,751 (9th Cir. 1989). It is the role of the
3 trier of fact, not this court, to resolve conflicts in evidence.
4 *Richardson*, 402 U.S. at 400. The court has a limited role in
5 determining whether the ALJ's decision is supported by substantial
6 evidence and may not substitute its own judgment for that of the
7 ALJ, even if it might justifiably have reached a different result
8 upon de novo review. 42 U.S.C. § 405 (g).

9 The ALJ's assessments of the evidence of mental impairment
10 and of plaintiff's credibility are supported by the record and
11 free of legal error.

12 **E. Step five**

13 Plaintiff alleges error at step five (Ct. Rec. 16 at 23). The
14 argument has already been addressed. Because the ALJ's RFC and
15 hypothetical question to the VE were based on the limitations the
16 ALJ found supported by the evidence, as required (see *Osenbrock v.*
17 *Apfel*, 240 F.3d 1167, 1164-1165 (9th Cir. 2001), the ALJ properly
18 relied on the jobs identified by the VE. *Bayliss*, 427 F.3d at
19 1217-1218.

20 **CONCLUSION**

21 Having reviewed the record and the ALJ's conclusions, this
22 Court finds the ALJ's decision is free of harmful legal error and
23 supported by substantial evidence..

24 **IT IS ORDERED:**

25 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 18**) is
26 **GRANTED.**

27 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 15**) is
28 **DENIED.**

1 The District Court Executive is directed to file this Order,
2 provide copies to counsel for Plaintiff and Defendant, enter
3 judgment in favor of Defendant, and **CLOSE** this file.

4 DATED this 4th day of June, 2010.

5
6 s/ James P. Hutton

7 JAMES P. HUTTON
8 UNITED STATES MAGISTRATE JUDGE
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